U.S. Dairy Export Council®

National Milk Producers Federation

STATEMENT OF

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Before the

COMMITTEE ON AGRICULTURE

UNITED STATES HOUSE OF REPRESENTATIVES

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to offer my views on the potential impact of the proposals regarding geographical indications that have been tabled by the European Union in the World Trade Organization (WTO) multilateral trade negotiations taking place in Geneva.

I am the President of the U.S. Dairy Export Council, a non-profit, independent membership organization that represents the export trade interests of U.S. milk producers, dairy cooperatives, proprietary processors, and export traders. The Council's mission is to increase the volume and value of U.S. dairy product exports. Today, I also speak on behalf of the National Milk Producers Federation, which represents the vast majority of milk producers in the United States.

The U.S. dairy industry is the second largest agricultural commodity sector in the United States, measured by farm cash receipts of $20 billion per

year, and is one of the top three agricultural sectors in fully half of the fifty states. In addition, dairy processors peg the annual retail value of their industry at $70 billion a year. Internationally, in 2002 the United States was the world's largest single country producer of cow's milk, with production of 170 billion pounds. Impressive as those numbers are, they represent only the milk producer side of the industry. Dairy processors, which turn milk into cheese, butter, ice cream, yogurt, milk powders and designer milk proteins and package the products, add tremendous value to milk after it leaves the farm. This further processing adds overall strength to the industry and adds jobs to the nation's economy.

The Protection of Geographical Indications

With the conclusion of the Uruguay Round, WTO Members accepted broad obligations regarding the protection of intellectual property. Those obligations are contained in the *Agreement on Trade-Related Aspects of Intellectual Property Rights* – commonly called the TRIPS Agreement. One type of intellectual property right that profited exceptionally well from the conclusion of the TRIPS Agreement is that of geographical indications. While a network of earlier international, bilateral agreements, and national laws provided some protection, the TRIPS Agreement offered, for the first time, comprehensive, global minimum standards for the protection of geographical indications.

The TRIPS Agreement defines geographical indications as "indications which identify a good as originating in the territory of a member or region or

locality in that territory where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."[1] There are two different standards of protection for indications that meet this definition, depending on the product involved.

For geographical indications associated with wines and spirits, the European Union insisted in the Uruguay Round on an especially high level of protection. Wine and spirit geographical indications are protected against any use for products not originating in the place referred to by the geographical indication. This protection is absolute, and applies even if the true origin of the goods is noted, the geographical indication is used in translation, or if the indication is accompanied by expressions such as "kind," "type," "style" or "indication."[2] Wine and spirit geographical indications are protected unconditionally, even if the labeling of the goods in question would not mislead consumers .

For all other products, the TRIPS agreement requires WTO Members to have national rules that provide interested parties with the legal means to prevent the use of any designation that suggests that a product originates someplace other than its true place of origin in a way that misleads consumers.[3] Members must also maintain rules providing interested parties with legal means to prevent use that constitutes "unfair competition," a term

[1] TRIPS Agreement, Article 22.1.

[2] TRIPS Agreement, Article 23.1.

[3] TRIPS Agreement, Article 22.2(a).

in intellectual property law that means, among other things, acts that create confusion about a competitor's goods. [4]

At the same time, the TRIPS Agreement allows WTO Members to leave unprotected those geographical indications that are considered generic – terms that are "identical with the term customary in common language as the common name for" a product.[5] Although the TRIPS Agreement establishes minimum standards of protection, countries have retained the right to establish their own specific requirements regarding eligibility, validity and enforcement of intellectual property rights. As a result, each WTO Member can decide for itself whether a term is generic.

This treatment is very important, because a term that is generic in one country might not be generic in other countries. For example, while the use of the term "feta" on a cheese produced in the United States and/or in Denmark might be seen as infringing the rights of some Greek producers about the origin of the product, it will not mislead consumers in the United States, in Denmark or pretty much anywhere else in the world, since in the United States or in Denmark the term "feta" is simply a common, generic name for a tasty, salty, crumbly white cheese that bears no association, in the minds of consumers, to the product's place of origin.

As you can see, Mr. Chairman, the ability to make country-specific judgments regarding the generic nature of cheese names is particularly

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[4] TRIPS Agreement, Article 22.2(b). *See also Paris Convention for the Protection of Industrial Property*, Article 10*bis*.

[5] TRIPS Agreement, Article 24.6.

important, since the European Union claims that U.S. and other producers have usurped European names for a number of cheeses that should qualify for protection of geographical indications, but that the United States and other countries consider to be generic.

Dangers of the European Union's Proposals

The current threat is an energetic and coordinated effort by the European Union to eliminate the ability a WTO Member now has to decide for itself whether a name is generic, through a series of three inter-related proposals that it has tabled in the on-going WTO negotiations in Geneva. Allow me to explain precisely how.

The first E.U. proposal seeks the extension to all products of the absolute protection currently afforded geographical indications associated with wines and spirits.[6] As I have already discussed, the TRIPS Agreement provides heightened protection for wine and spirit geographical indications. The rules provide an absolute prohibition against labeling wines or spirits with a name similar to a geographical indication, even if use of the name would not mislead consumers about the origin of a product. This heightened level of protection for wines and spirits is an exception from the general rule that arises out of the unique history of those products. The general rule, as noted above, requires protection against uses of geographic terms that are misleading or constitute an act of unfair competition. In other words, the

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[6] *Communication from Bulgaria, Cyprus, Cuba, Czech Republic, the European Community and their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, Slovakia, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey,* IP/C/W/353 (24 June 2002).

European Union wants the exception to swallow the general rule.

The European Union contends that even if a new agreement extends heightened protection to products other than wine and spirits, Members would still retain the right to deem certain names generic, and as a result to withhold geographical indication protection for those names.[7] Its second proposal eliminates this option, however. Disguised as a way "to guarantee fair market access opportunities" for products "whose quality, reputation or other characteristics are essentially attributable to their geographical origin and traditional know-how," the European Union's so-called **"claw back"** proposal calls for a list of geographical indications that would be "exclusively reserved to the agricultural products originating in the place indicated by the geographical indication in question."[8] The E.U. proposal would **"claw back"** these names even if they are considered generic.[9] Even if the extension of heightened geographical indication protection to products other than wine and spirits carries with it an opportunity to exempt generic names, therefore, the list established by the E.U. **"claw back"** proposal would erase that opportunity.

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[7] *The extension of additional protection for geographical indications to products other than wines and spirits*, *Communication from the European Communities*, JOB (03)/119 (23 June 2003), pg. 4 ("Wines and spirits have enjoyed such 'extended' protection since 1996. In the US, for example, 'additional' protection for a GI like 'Oporto' had the potential, in 1996, of preventing the use of the English translation 'Port' by US producers. However, the US has made representations that this term is a 'generic' within the meaning of Article 24.6 of the TRISP Agreement and does not grant any protection to it. Consequently, the scope of 'exceptions' has a bearing on the potential implications in every third party market.").

[8] *Id*., pg. 3.

[9] *The EC's Proposal for Modalities in the WTO Agricultural Negotiations* (29 January 2003), pg. 9 (draft Article 4.3).

The third E.U. proposal concerns the establishment of a multilateral notification and registration system for geographical indications associated with wine and spirits. The negotiations are limited to a registry for wines and spirits, but given the debate on extension described earlier, the European Union's intent is for the system to one day apply to all products.

The E.U. proposal would create a full registration system that would result in uniform, world-wide protection for registered geographical indications.[10] While one could raise an objection to a registration in the case of a generic name, a private party would have to rely on its government to raise this objection, since the E.U. proposal does not provide for direct objections by private parties. Once a geographical indication is registered, its status could not be challenged in national courts on the basis that it is generic. In addition, the U.S. could raise an objection about a geographical in dication, but many developing countries may not have the systems in place to routinely review new registration proposals. Consequently, the U.S. could in fact lose the ability to export the new registered geographical indication (e.g. parmesan) into the markets of those developing countries that did not oppose the registration. Furthermore, the E.U. proposal would require a WTO Member to protect a registered geographical indication, even if the indication

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[10] *Implementation of Article 23.4 of the TRIPS Agreement Relating to the Establishment of a Multilateral System for the Notification and Registration of Geographical Indications, Communication from the European Communities and their member States*, IP/C/W/107/Rev.1 (22 June 2000). The United States' competing proposal, in contrast, foresees a non-binding, elective system. *See Proposal for a Multilateral System for Notification and Registration of Geographical Indications for Wines and Spirits Based on Article 23.4 of the TRIPS Agreement, Communication from Argentina, Australia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Namibia, New Zealand, Philippines, Chinese Taipei, and the United States* , TN/IP/W/5 (23 Oct. 2002).

is considered generic in that country. Again, therefore, even if the European Union's extension proposal would permit a WTO Member to deny protection to a generic name, the E.U. registry proposal would take that discretion away.

Costs of the European Union's Proposals

The costs involved for each WTO Member to adopt a system that would provide and enforce absolute protection for geographical indications for all products would be inordinately high. The costs to consumers would also be significant. While the European Union tries to sell its proposals as a benefit to consumers by ensuring that they know the origin of the product they are buying,[11] under the system envisioned in the E.U. proposals, consumers will in fact have fewer choices and pay higher prices than they do today. If protecting consumers is the European Union's real goal, we need to ask why the current TRIPS rules for geographical indications not associated with wines and spirits are insufficient. Those rules require WTO Members to maintain measures that will prevent the use of names that mislead consumers about the origin of a product.[12] If consumer protection is the objective, the current rules are sufficient.

The European Union's motivation is clear – and it is not consumer protection. As E.U. agricultural producers continue to lose their competitive edge in markets around the globe as it slowly ratchets down its hugely expensive support and export subsidies, the European Union has frantically sought a new way to skew the playing field in favor of E.U. agricultural

[11] JOB (03)/119, pg. 6.

products. The real beneficiaries of the E.U. proposals will be European agriculture producers, who will enjoy the price premiums associated with monopoly use of names that have long been generic throughout the world.

The impact on users of generic terms is potentially enormous. If the European Union's proposals are accepted in full, names that are considered generic in the United States will no longer be available for use by U.S. agricultural producers. For example, U.S. producers, processors and traders of cheeses with names such as feta, mozzarella, parmesan, brie, cheddar, havarti, muenster and gouda, many of them displayed before this committee, would no longer be able to use these names to market their products either at home or abroad. This would sharply disrupt domestic and export sales of U.S. cheeses with a commensurately negative effect on their U.S. processors and the dairy farmers who supply them. These sales would only recover, if at all, through massive investments to make consumers familiar with new names for cheeses that are unchanged in taste and composition from what they have long known and appreciated. In a business with historically tight margins at both the wholesale and farm level, such unnecessary investments could be ruinous to processors and co-operatives alike.

Conclusion

Mr. Chairman, the U.S. Dairy Export Council and the National Milk Producers Federation have made numerous attempts to understand and even contemplate a potential understanding on Geographical Indications that

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[12] TRIPS Agreement, Article 22.2.

would allow the U.S. to achieve substantial trade reforms in the Doha Round, along the lines currently proposed by the U.S. government negotiators. However, we must express complete disillusionment with the EU's total disregard for trade reform, trademarks and generic names. There should be no doubt to this Committee the EU will not rest until their past is protected, regardless of the years of efforts by U.S. producers and processors in promoting and producing these products. We are mindful of our duties regarding Doha and Cancun. There should be no mistake; we have worked hard to find a resolution. However, this seems to be unreachable at this time due to the unreasonable, anti-competitive requests by the European Union.

We must remain cognizant of the fact that the WTO Members have issued no mandate to negotiate the extension to other products of the heightened protection currently granted wine and spirit geographical indications. The negotiation of a multilateral notification and registration system is the subject of a mandate,[13] but only for wine and spirits. The European Union offers this ambitious bid for a full registration system in the clear hope that that system will at some point apply to *all* products. And the European Union's only nod to market access in the agricultural negotiations is not a concession, but rather a new anti-trade requirement, as demonstrated by its proposal to "**claw back**" a list of terms from the category of generic names. Its recent, much ballyhooed CAP reform proposal fails even to hint at any

potential market access *concessions*.

As we head toward the September 10-14 WTO ministerial meeting in Cancún, the threat of E.U. success on its aggressive geographical indications agenda looms large. The European Union has made clear that the only way it will make "significant concessions" in the agriculture negotiations is if it gets what it wants on geographical indications.[14] It has already succeeded in elevating TRIPS Council discussions on the issue of extension into more focused consultations chaired by WTO Director General Supachai.[15] Unless the U.S. government and its allies are firm in their opposition to the E.U. agenda, we fear that our interests will be sacrificed to keep Cancún from becoming the next Seattle. As I have discussed, handing the European Union success on its geographical indications agenda will mean putting at risk the U.S. dairy industry's success, along with the many U.S. jobs it creates across the country. Mr. Chairman, I ask the Committee's help in making sure that this does not occur.

Thank you once again for the opportunity to express my views. I would be pleased to answer any questions you have.

Thomas M. Suber

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[13] *See* TRIPS Agreement, Article 23.4; *Ministerial Declaration*, WT/MIN(01)/DEC/W/1 (14 November 2001), para. 18.

[14] *See, e.g., EU Official Berates Developing Countries Over Delays in WTO Market Access Talks*, BNA International Trade Reporter (18 July 2002).

[15] WTO press release, *Informal Consultation at the level of Heads of Delegation*, Statement by the Chairman of the TNC (14 May 2003).